BBMB Kewangan Bhd v Kueh Teck Swee

HIGH COURT (KUCHING) — CIVIL REVISION NO 13–31 OF 1991–I
IAN CHIN J
21 NOVEMBER 2000

Land Law *— Lease — Holding over — Negotiations between parties — Whether holding over proved and double rent payble*

Land Law *— Lease — Construction — Refund of deposit — Disrepair of premises — Whether appellant entitled to forfeit deposit — Whether appellant only entitled to make relevant deductions — Whether tenant entitled to remove trade fixtures*

The respondent, BBMB Kewangan Bhd ('the plaintiff') claimed for a refund of the deposit of RM27,000 which they paid to the appellant landlord ('the defendant') under a lease that expired on 30 September 1989. The defendant claimed to be entitled to keep the deposit on the ground that the plaintiff had breached the terms of the lease and counterclaimed for a sum of RM36,723.13 for repairs and for the value of fixtures removed. The counterclaim consisted of a claim for double rent of RM5,516.13 for the period 1 October 1989 to 19 October 1989 for the plaintiff holding over after the lease had expired, for RM20,202 being the cost of repair and RM11,005 being the value of fixtures and fittings which were removed. The trial court gave judgment for the plaintiff and dismissed the defendant's counterclaim and hence the appeal.

Held, allowing the plaintiff's claim for refund of the deposit and the defendant's counterclaim for costs of repairs:

(1) The evidence showed that the plaintiff was, during the period of the alleged holding over, engaged with the defendant in negotiating the costs of the repair and the defendant was looking for a tenant to replace the plaintiff. There was no holding over as the plaintiff's furniture was at the premises with the permission of the defendant (see p 180B–C, E).

(2) The defendant's argument that if the premises is in any state of disrepair on the date the lease expires, the RM27,000 deposit need not be refunded but instead can be forfeited appears to be premised on the wrong footing. A reasonable construction of the clause of the lease agreement would be that the deposit need only be refunded after deductions are made to make good the breaches or non observance. The defendant has no right to forfeit the deposit but need only refund what sums remaining after deductions for repair (see pp 180G, 181B–C). There is evidence that the defendant had actually paid the sum of RM16,356.75 for repair. There is no reason why the defendant should not be entitled to this sum (see p 181D).

(3) The items (air conditioners, steel frame shelves, lighting and wirings) are 'trade fixtures', since they are primary for the purpose

of the business of the plaintiff as a financial institution. The object and purpose of those items are clearly to serve the business of a financial institution and for the enjoyment of the tenant (and their customers) rather than to benefit the premises. Therefore, the plaintiff was entitled to remove them (see p 184D–E).

[**Bahasa Malaysia summary**

Penentang, BBMB Kewangan Bhd ('plaintif') menuntut bayaran balik bagi cengkeram RM27,000 yang dibayar oleh mereka kepada tuan tanah perayu ('defendan') di bawah satu pajakan yang luput pada 30 September 1989. Defendan menuntut bahawa beliau berhak menyimpan cengkeram tersebut atas alasan bahawa plaintif telah melanggar terma pajakan tersebut dan membuat tuntutan balas sebanyak RM36,723.13 bagi pembaikian dan bagi nilai lekapan yang dikeluarkan. Tuntutan balas tersebut terdiri daripada satu tuntutan bagi sewa berganda dua bernilai RM5,516.13 bagi tempoh 1 Oktober 1989 hingga 19 Oktober 1989 kerana plaintif berpegang lepas masa setelah pajakan tersebut luput, satu tuntutan RM20,202 bagi kos pembaikian dan RM11, 005 sebagai nilai lengkapan dan lekapan yang dikeluarkan. Mahkamah perbicaraan memberikan penghakiman kepada plaintif dan menolak tuntutan balas defendan, oleh itu rayuan ini dibuat.

Diputuskan, membenarkan tuntutan plaintif bagi bayaran balik cengkeram dan tuntutan balas defendan bagi kos pembaikian:

(1) Keterangan menunjukkan bahawa plaintif, sewaktu tempoh pemegangan lepas masa yang dikatakan, sedang berurusan dengan defendan dalam rundingan kos pembaikian dan defendan sedang mencari penyewa untuk menggantikan plaintif. Tiada pemegangan lepas masa berlaku kerana perabot plaintif berada di dalam premis tersebut atas izin defendan (lihat ms 180B–C, E).

(2) Hujahan defendan bahawa jika premis tersebut berada dalam keadaan tidak berbaiki pada tarikh pajakan itu berakhir, cengkeram RM27,000 itu tidak perlu dikembalikan tetapi akan dilucut hak nampaknya tersilap. Tafsiran wajar fasal perjanjian pajakan tersebut adalah bahawa cengkeram tersebut hanya perlu dikembalikan selepas potongan dibuat untuk membaiki pelanggaran atau ketidakpatuhan. Defendan tidak berhak melucut hak cengkeram tersebut tetapi perlu mengembalikan apa yang tinggal setelah potongan untuk pembaikian dilakukan (lihat ms 180G, 181B–C).Terdapat keterangan bahawa defendan telahpun menjelaskan jumlah RM16,356.75 untuk pembaikian. Tiada sebab kenapa defendan tidak berhak atas jumlah ini (lihat ms 181D).

(3) Barang-barang (penghawa dingin, rak berbingkai besi, lampu dan wayar-wayar) ialah 'lekapan perniagaan', kerana ia utama bagi

tujuan perniagaan institusi kewangan plaintif. Objek dan matlamat barang-barang tersebut jelas bagi tujuan perniagaan institusi kewangan dan bagi kegunaan penyewa (serta pelanggan-pelanggan mereka) dan bukannya bagi faedah premis tersebut. Oleh itu, plaintif berhak mengeluarkan barang-barang tersebut (lihat ms 184D–E).]

Notes

For cases on construction of a lease, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 22555–2256.

Cases referred to

Beaufort v Bates 31 LJ Ch 485 (refd)
Billing v Pill [1954] 1 QB 70 (refd)
Bishop v Elliot 11 Ex 113 (refd)
Elliot v Bishop 24 LJ Ex 229 (refd)
Reynolds v Ashby [1904] AC 474 (refd)
Shell Co, The v Commissioner of the Federal Territory [1964] MLJ 302 (refd)
Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 23 (refd)
Spyer v Phillipson [1931] 2 Ch 183 (refd)
Stephens, Ex parte (1877) 7 Ch D 127 (refd)
Vaudeville Electric Cinema Ltd v Muriset [1923] 2 Ch 74 (refd)

Legislation referred to

National Land Code 1965
Sarawak Land Code

Mohd Hisham (*Sulong Matjeraie & Co*) for the plaintiff/respondent.
Bexter Michael (*Ee & Lim*) for the defendant/appellant.

Ian Chin J:

Introduction

BBMB Kewangan Bhd ('the plaintiff/respondent') claimed for a refund of the deposit of RM27,000 which they paid to the landlord, Kueh Teck Swee ('defendant/appellant'), under a lease that expired on 30 September 1989. The appellant claimed to be entitled to keep the deposit on the ground that the respondent had breached the terms of the lease and counterclaimed for a sum of RM36,723.13 for repairs and for the value of fixtures removed. After a trial, the lower court on 28 March 1994 gave judgment for the respondent and dismissed the appellant's counterclaim. The appellant filed their notice of appeal on 8 April 1994 and had been waiting since that date for the grounds of the decision. I called this matter up by way of revision on 1 December 1999. The parties had given up hope of receiving the grounds

of decision and had agreed that the appeal proceeds without them even though certain part of the appeal turns on the findings of facts, which in turn depends on the credibility of the witnesses; it is between the devil and the deep blue sea. On 24 October 2000, I heard the appeal which is concerned primarily with the counterclaim.

Counterclaim

As for the breaches, these were alleged to be of cl I(e), (g) and II(d) which read:

> I THE SUBLESSEE COVENANTS WITH THE SUBLESSOR as follows:
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> (e) to keep the demised premises in good and tenantable repair and condition throughout the term hereby created, fair wear and tear excepted;
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> (g) subject to cl 2(e) hereof at the expiration or sooner determination of this sublease to peacefully yield up to the sublessor the demised premises in good and substantial repair and condition, fair wear and tear excepted.
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> II THE SUBLESOR HEREBY COVENANTS WITH THE SUBLESSEE as follows:
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> (d) to permit the sublessee to install and keep installed such partitions within the demised premises as the sublessee may require for the purpose of carrying on the sublessee's business PROVIDED THAT except for chattels belonging to the sublessee, all such installations or partitions made under this or by virtue of the preceding clause shall not be removed by the sublessee at the expiration of the term hereby created; … .

The provision under which the defendant claims to be entitled to retain the deposit is cl 1(a) which reads:

> THE SUBLESSEE COVENANTS WITH THE SUBLESSOR as follows:
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> (a) to pay the sublessor upon the execution of this sublease a sum of RINGGIT MALAYSIA TWENTY SEVEN THOUSAND ONLY (RM27,000) as deposit and the due performance of this contract, which subject to the provisions hereinafter contained, shall be refunded without interest to the sublessee on the expiration of the term hereby granted or on the earlier determination thereof PROVIDED THAT on the said expiration there shall not be any existing breach or non-observance of any of the terms and conditions on the part of the sublessee herein contained;

The counterclaim consisted of a claim for double rent of RM5,516.13 for the period 1 October 1989 to 19 October 1989 for the plaintiff holding over after the lease had expired, for RM20,202 being the cost of repair and RM11,005 being the value of fixtures and fittings (two air conditioners, steel frame shelves and lighting and wiring).

The grounds of appeal

Holding over

The lease expired on 30 September 1989 but some office furniture of the plaintiff remained in the building and was only removed on 19 October 1989. The dispute concerns whether there was consent given to the plaintiff to remain. The lower court decided that the defendant had consented to the plaintiff to do so. Unfortunately, the lower court did not give any reason how such a conclusion was arrived at. However, the evidence show that the plaintiff was, during that period, engaged with the defendant in negotiating the costs of the repair and the defendant was looking for a tenant to replace the plaintiff. On or after 25 September, the defendant had already obtained a quotation for RM18,527.50 for repairs and this was referred to by the plaintiff in their letter to the defendant dated 14 October and offering to accept only the sum of RM13,400 which is the sum of another quotation procured by the plaintiff. For the first time, on 18 October the defendant, through his advocates, wrote to the plaintiff demanding that they vacate the premises by the afternoon. It will be observed that there is no allegation that the plaintiff had remained there despite protests by the defendant . The letter also insisted on the repair costs being RM18,527.50. Pausing here, if the plaintiff was really holding over instead of having been given permission to store their furniture there, that letter from an advocate would assert so. Contemporaneous documents are more reliable than the testimony of interested witnesses. For this reason, I would agree with the lower court that there was no holding over as the plaintiff's furniture was at the premises with the permission of the defendant. This is plausible because the defendant could not rent out the premises without repair and the repair, has yet to begin pending agreement by the parties as to the costs. So the defendant lost nothing. This is further borne out by the fact that the defendant was only able to get the premises rented as from 1 November.

The deposit

The defendant's argument appears to me to be premised on the wrong footing, that if the premises is in any state of disrepair on the date the lease expires, the RM27,000 deposit need not be refunded by the defendant but instead can be forfeited. The operative words governing the deposit are these:

> … shall be refunded without interest to the sublessee on the expiration of the term hereby granted, or on the earlier determination thereof PROVIDED THAT on the said expiration there shall not be any existing breach or non observance of any of the terms and conditions on the part of the sublessee herein contained; … .

There is no provision there that the deposit can be forfeited but only that the refund cannot be made. Forfeiture of the deposit is only allowed if the defendant had re-entered the premises on account of the happening of events spelt out in cl III(c), viz:

(1) the plaintiff failing to pay rent for 21 days after becoming due;

(2) the plaintiff failing to observe and perform their covenants;

(3) the plaintiff being wound up or having entered into composition with their creditors; or

(4) the plaintiff suffering any distress or execution

This means, taking the documents as a whole, a reasonable construction of the clause would be that the deposit need only be refunded after deductions are made to make good the breaches or non observance since there is no re-entry by the defendant under cl III(c). The defendant has no right to forfeit the deposit but need only refund what sums remaining after deductions for repair.

Cost of repair

By the plaintiff's own admission, contained in the letter I had referred to earlier, the plaintiff is under a liability to pay the defendant a sum of RM13,400. So it cannot be denied that the premises needed repair and at the very least, a repair that would cost that sum. There is evidence that the defendant had actually paid the sum of RM16,356.75 for repair. There is no reason why the defendant should not be entitled to this sum.

Chattels or Fixtures

Since the definition of 'land' in the Sarawak Land Code includes 'things attached to the earth or permanently fastened to anything attached to the earth', prima facie everything that is permanently attached to a building erected on the land belongs to the landowner unless the parties have agreed otherwise. That is from the Roman law of *quicquid plantatur solo, solo cedit*. Therefore, whether the things can be removed or not by the tenant would depend on whether the things had been 'permanently fastened' or on what the parties had agreed. The word 'permanently' used in the Sarawak Land Code connotes the sense of indefinitely but its application may be difficult in relation to things that can be removed. Take for example, mosquito screens installed onto the windows of a house and which sit on tracks bolted onto the building. For as long as the building is occupied those screens would be required but they can nevertheless be removed or rendered unnecessary as when the occupier decides to close all the windows and use the air conditioners. Does that mean that those items are not permanently fastened? I think not, because permanency should not be determined by whether it can be removed or else, a door or window affixed to a house can be regarded as not being permanently fastened since they can be removed. Therefore, the fact that those items under dispute can be removed does not mean that they were not permanently fastened to the buildings since they are affixed either to the wall or the ceiling with the help of bolts, nuts, screws or other contraptions. But the light tubes or bulbs are in a different situation as they are not so attached and cannot therefore be regarded as permanently fastened.

The dispute in the present case concerned air conditioners, lightings and their wirings which were removed by the plaintiff which the defendant argued the plaintiff should not have done, on the ground that they were 'fixtures'. The plaintiff argued that the following provisions allowed them to do so, viz:

> Clause 11
>
> (c) to permit the sublessee to install attach and affix and keep installed attached and affixed for as long as the term hereby granted shall last in or at the front of the demised premises such placards, signboards writings, signs or notices relevant to the business of the sublessee;
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> (d) to permit the sublessee to install and keep installed such partitions within the demised premises as the sublessee may require for the purpose of carrying on the sublessee's business, PROVIDED THAT except for chattels belonging to the sublessee all such installations or partitions made under this or by virtue of the preceding clause shall not be removed by the sublessee at the expiration of the term hereby created;

It is clear to me that those items had been 'installed, attached and affixed' within the meaning of cl 11(c). The plaintiff was allowed to remove them only if they are 'chattels' belonging to the plaintiff.

One construction of the meaning of the two sub-cl would be that if the air conditioners, lightings and wirings are 'chattels' they can be removed even if they had become 'fixtures' by being installed in, attached or affixed to the premises. Now a 'fixture' invariably consists of a 'chattel' because it is through the annexation or attachment or affixation of a chattel that result in it being a 'fixture'. Since air conditioners, lightings and wirings were chattels, that would mean that they have to be returned. That construction would render everything that the plaintiff had installed removable by the plaintiff, and thus rendering cl II (d) completely useless or ineffective if it was intended to pass the benefit of fixtures to the defendant . Removal of those items would invariably cause damage to the premises since holes will be left behind after the removal of the contraptions, like frames, nuts, bolts and screws, that kept those items in place. If the wirings were internal, that is hidden or ran through conduits embedded in the brick walls, then the resulting damage from their removal would be much more since reinserting wires in such conduits would be difficult. The wirings, when removed, are also practically useless to the plaintiff and that being the case, it could not have been the intention of the parties to provide for their removal notwithstanding that there is a provision for repair by the plaintiff. Therefore, a construction having that result should not be preferred.

The other construction is to regard the word 'chattels' as having been employed by the parties in contradistinction to the term 'fixtures' because although the term 'fixtures' is not expressly mentioned its definition has been adopted by the use of the term 'install, attach and affix'. This means if the chattels had become fixtures, the plaintiff would not be allowed to remove them. The only description that can closely resemble the English law of fixtures is in the definition of land in the Sarawak Land Code which I have referred to and which uses the test of whether a thing had been

'permanently fastened' before it was considered part of the land and passes with the land to the owner of the land. The English law of fixture is the product of the common law and not of statute, and it has been said to have no precise meaning. *Stroud's Judicial Dictionary* (4th Ed) vol 2 at p 1059 stated this:

> It is 'used by different writers to express different meanings; but it is always applied to articles of a personal nature which have been affixed to land. In its most extensive sense it means anything annexed to the freehold in such a manner as to become parcel of it' … and it will pass with it.

The term 'fixtures' under the English law assumes different legal consequences when used in leases (where you will have distinctions such as 'tenant fixtures' which can be removed), or involving certain parties where 'trade fixtures' can also be removed. The English law has many formulations or tests for deciding whether a chattel is a fixture, all of which has no correlation to whether the chattel was 'permanently fastened'. The following examples will illustrate what I have said:

(1) In considering what is a fixture, 'attention must be paid, not only to the nature of the thing and to the mode of attachment, but the circumstances under which it was attached, the purpose to be served, and last, but not least, to the position of the rival claimants to the thing in dispute' (per Lord Lindley, *Reynolds v Ashby* [1904] AC 474);

(2) An army hut, the floor of which was secured to a concrete base by bolts led into the concrete, was not a fixture (*Billing v Pill* [1954] 1 QB 70);

(3) Seats secured to the floor by screws, a patent screen covered with cloth fresco paintings, and advertising boards outside the hall are not 'fixtures' in a cinema hall (*Vaudeville Electric Cinema Ltd v Muriset* [1923] 2 Ch 74); and

(4) In determining whether a particular chattel was a tenant's or a landlord's fixture, the court had to consider what were the object and purpose of the annexation, and what would happen if the annexed chattel was removed. So long as the chattel could be removed without doing irreparable damage to the demised premises, neither the method of attachment nor the degree of annexation, nor the quantum of damage that would be done either to the chattel itself or to the demised premises by the removal, had any bearing on the right of the tenant to remove it, except in so far as it throws a light upon the question of the intention with which the tenant affixed the chattel to the demised premises (*Spyer v Phillipson* [1931] 2 Ch 183);

(5) 'Trade fixtures' can be removed by a tenant, and these comprised chattels which are annexed by a tenant for the more profitable or convenient carrying on of his trade in the premises (*Elliot v Bishop*; *Bishop v Elliot* 24 LJ Ex 229; 11 Ex 113); and

(6) A lease ought not to be construed so as to take away the ordinary right of a tenant to remove trade chattels unless such an intention is clearly expressed (*Beaufort v Bates* 31 LJ Ch 485).

So, even though a chattel may be 'permanently fastened' as in the illustrations (2), (3) and (5), they still cannot be fixtures as to pass with the land. Therefore, if English law is to be applied, the statutory meaning of the term 'permanently fastened' looses its significance if not its relevance. But Malaysia had applied the English law relating to 'fixtures' (see *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 23; *The Shell Company v Commissioner of the Federal Territory* [1964] MLJ 302) even though the National Land Code 1965 has the term 'permanently fastened' in its definition of land. Since *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* is a Federal Court decision which did not disapprove of the application by the High Court of the English law on fixtures, I will regard that as having been approved. Since the Sarawak Land Code definition of 'land' has a similar term as that of the National Land Code, I have also to apply the English law of fixtures even though it will give the term 'permanently fastened' a meaning other than which the ordinary meaning would encompass.

Given the illustrations I have given, it is not difficult to conclude that the items are 'trade fixtures', since they are primary for the purpose of the business of the plaintiff as a financial institution. Nowadays, no office is usually housed in window less building and the computers that are invariably used would require air conditioning if the chips are not to get over heated. Lightings and their attendant wirings are without doubt a necessity for the business. The object and purpose of those items are clearly to serve the business of a financial institution and for the enjoyment of the tenant (and their customers) rather than to benefit the premises. Therefore, the plaintiff was entitled to remove them.

It was then argued that they should have been removed before the expiry of the tenancy and as they were not, the plaintiff lost their right to remove them. Megarry & Wade on *The Law of Real Property* (4th Ed) at p 716:

> Trade Fixtures. Fixtures attached by the tenant for the purpose of his trade or business have long been removable by the tenant at any time during the term, but not after it has come to an end.

But it can still be removed within such reasonable time thereafter as may be properly attributed to his possession qua tenant (Megarry & Wade on *The Law of Real Property* (4th Ed) at p 716). This has been explained by James LJ in *Ex p Stephens* (1877) 7 Ch D 127 in these words:

> The law is clearly settled that the right of a tenant to fixtures is a qualified right. It is a right to have the fixtures if he removes them during his term, or during a certain time after its expiration, something which may be called an enlargement of the term, or, to use the words of Baron Parke, an excrescence on the term, during which the tenant has the right to consider himself as still in possession of the premises as tenant under the landlord.

I have earlier, with regard to the issue of holding over, held that the plaintiff remained in possession with the permission or agreement of the defendant, during which the items were removed. This to my mind comes fairly within the exception mentioned above against removal after the lease has expired.

A Therefore, the plaintiff had the right to remove the items. This conclusion does no injustice to the defendant as I have allowed him the cost of the repairs occasioned by the removal of those items.

Conclusions

B In the premises I allow the appeal in part. The judgment for the plaintiff for the sum of RM27,000 remains but the order for costs shall be set aside. Against this judgment sum of RM27,000 shall be set-off the sum of RM16,356.75 being the costs of repair which counterclaim of the defendant I allowed. Taking into account that both parties have succeeded both here and below, there will be no costs both here and below.

C *Appeal partially allowed.*

Reported by Benjamin Yong

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